No. 89-1375

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

BP EXPLORATION (ALASKA) INC.,
EXXON CORPORATION, and CHEVRON U.S.A. INC.,
Petitioners,

VS.

DOUGLAS B. BAILY, ATTORNEY GENERAL OF THE STATE OF ALASKA, LENNIE BOSTON-GORSUCH, COMMISSIONER OF NATURAL RESOURCES OF THE STATE OF ALASKA, GARY GUSTAFSON, DIRECTOR OF THE DIVISION OF LANDS, JAMES E. EASON, DIRECTOR OF THE DIVISION OF OIL AND GAS, AND WALTER L. CARPENETI, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ALASKA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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TABLE OF AUTHORITIES

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PETITIONERS' REPLY BRIEF*

1. Our Petition points out that the court of appeals failed to offer any single, coherent rationale for its "ripeness" decision dismissing petitioners' claim to a constitutionally fair forum in an action seeking literally billions of dollars. Instead, the court of appeals inconsistently and variously suggested that this case was

* Petitioners' parent companies and non-wholly owned subsidiaries are listed in the Appendix to the Petition, pp. A-21 to A-23.

not ripe because (1) petitioners had not invoked state disqualification procedures to attempt to cure the alleged bias; or, alternatively, (2) the facts establishing the existence of the claimed financial interest had not yet been proved at trial; or, alternatively, (3) petitioners had not presented their due process claim for decision by the biased state court. See Petition, pp. 8-9, 14-18.

Respondents make no serious effort to defend the first two of the grounds proffered by the court of appeals.[1] Indeed, they essentially admit that state disqualification procedures can provide no remedy because every Alaska judge and juror possesses the same disqualifying financial interest, and the recusal of one judge or juror would simply result in their replacement by another possessing the same unconstitutional bias.[2] Thus, as pointed out in the Petition (Petition, pp. 17, 21-23), this case is not "essentially indistinguishable from the myriad disqualification claims which arise routinely in many state court cases," as respondents assert. Br.in Opposition, p. 9. The cases relied upon are clearly inapposite, either because they involved no claim that the state tribunal was biased at all,[3] or because they are cases in which it was claimed only that particular state judges or jurors possessed a

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[1] Respondents simply note in passing (Br.in Opposition, p. 6, n. 4) that there are alleged unanswered factual questions, without explaining why they are relevant to a *ripeness* decision, rather than to the validity of the due process claim on the merits. Petition, pp. 15-16. Elsewhere, respondents concede the irrelevance of this argument, because "[g]iven the procedural context of this case, Petitioners' factual allegations were accepted as true." Br.in Opposition, p. 4, n. 1.

[2] Indeed, it is undisputed that a state law challenge to an Alaska juror based on the alleged bias in this case is not even possible, as Alaska recently amended its court rules to provide that no juror may be challenged on the ground of his or her financial interest as a Permanent Fund dividend recipient. See Alaska Civ.Rule 47(c)(12).

[3] *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1 (1987); *Pulliam v. Allen*, 466 U.S. 522 (1984); *Cross v. Lucius*, 713 F.2d 153 (5th Cir. 1983); *Mendez v. Heller*, 530 F.2d 457 (2d Cir. 1976).

subjective bias, not that all judge and jurors in the state were objectively and incurably disqualified.[4]

2. Respondents' only real effort to defend the decision below is to urge that the court was correct in its third possible ground of decision—the conclusion that a federal section 1983 action cannot be "ripe" until the federal constitutional question at issue has first been presented to and decided by the biased state court itself. Br.in Opposition, pp. 9-15.[5] Thus, respondents assert that "parties are required to avail themselves of state court procedures to litigate their constitutional claims" (id., p. 8), subject only to review by this Court on certiorari, and that no denial of due process can be said to have occurred "[u]nless and until that claim is presented [to] and denied" by the courts of the state. Id., p. 15.

This claim is wholly unsupportable. Indeed, that very contention was explicitly and squarely rejected by this Court over seventy-five years ago in its foundation decision in *Home Tel. & Tel. Co. v. Los Angeles*, 227 U.S. 278 (1913), where the Court observed:

> "as the Constitution of the United States is the paramount law, as much applicable to States, or their officers, as to others, it would come to pass that in every case where action of a state officer was complained of as violating the Constitution of the United States, the Federal courts in any form of procedure, or in any stage of the controversy, would have to await the determination of a state court as to the operation of the Constitution of the United States. It is manifest that in necessary operation the doctrine which was sustained would in substance cause the state courts to become the primary

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[4] *Kugler v. Helfant*, 421 U.S. 117 (1975); *Laird v. Tatum*, 409 U.S. 824 (1972); *Partington v. Gedan*, 880 F.2d 116 (9th Cir. 1989); *Flangas v. State Bar of Nevada*, 655 F.2d 946 (9th Cir. 1981); *Peterson v. Sheran*, 635 F.2d 1335 (8th Cir. 1980); *Dostert v. Neely*, 498 F.Supp. 1144 (S.D.W.Va. 1980).

[5] Repondents' argument that a "blanket" disqualification motion should be filed (Br.in Opposition, p. 20, n. 12) is simply another version of this argument.

> source for applying and enforcing the Constitution of the United States in all cases covered by the Fourteenth Amendment." Id. at 285.

See also *New Orleans Public Serv. v. Council of New Orleans*, 109 S.Ct. 2506, 2520 (1989) ("there is no doctrine that the availability or even the pendency of state judicial proceedings excludes the federal courts); cf. *R.R. Commission v. Duluth St. Ry.*, 273 U.S. 625 (1927) (plaintiff not required to submit claims to state court whose decision may be preclusive).[6]

Similarly, the contention that 42 U.S.C. § 1983 "does not grant federal courts jurisdiction to intervene in pending state court proceedings" to protect federal constitutional rights (Br.in Opposition, pp. 7-8) is plainly misplaced. Absent any recognized basis for abstention—and none is present here (infra, pp. 5-6)—it decidedly *is* the role and duty of the federal courts to pass on federal constitutional claims in the exercise of the jurisdiction that Congress has conferred under section 1983:

> "The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights * * *. * * *[F]ederal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (emphasis added).

Respondents additionally disregard that this action does not simply involve a "federal constitutional issue[] which may happen to arise *in the course of* [state] proceedings." Br.in Opposition, p. 8 (emphasis added). It involves instead a claim that the entire conduct of proceedings in a court all of whose judges and

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[6] Respondents provide no response at all to the point that the court of appeals' "ripeness" dismissal, which necessarily is without prejudice to petitioners' right to return to federal court following a ruling by the state court, conflicts with the general principle that a ruling by the state court on petitioners' due process claim would be preclusive of subsequent federal court litigation. See *Allen v. McCurry*, 449 U.S. 90 (1980).

jurors possess a constitutionally disqualifying financial interest must be enjoined.

3. Respondents further attempt to support the decision on the ground (not reached below) "that the *Younger* doctrine provides an independent and fully justifiable basis for affirming the actions of the courts below." Br.in Opposition, p. 16. But, in *Gibson v. Berryhill*, 411 U.S. 564 (1973), this Court established that *Younger* abstention is not proper where the state tribunal is "incompetent by reason of bias to adjudicate the issues pending before it." Id. at 577. Respondents attempt to evade this controlling decision by the specious contention that *Gibson* involved a biased state administrative body, while this case involves a biased state court. Br.in Opposition, p. 13. For purposes of *Younger* abstention, however, this Court has repeatedly held that there is no relevant distinction between state court proceedings and state administrative proceedings that are judicial in nature. *Middlesex Ethics Comm. v. Garden State Bar Assn.*, 457 U.S. 423, 433-434 (1982); *Ohio Civil Rights Comm'n v. Dayton Schools*, 477 U.S. 619, 627 (1986).

Respondents also attempt to evade *Gibson* by claiming that there was no procedure available for challenging the biased decisionmakers in *Gibson*. Br.in Opposition, p. 13. Even assuming this were true, however, it would be irrelevant. The explicit premise of *Gibson* is that there must be an opportunity to raise the federal issues before a "*competent* state tribunal" (*Gibson*, supra, 411 U.S. at 577 (emphasis added)), and it is beyond question that no such opportunity exists in this case.[7]

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[7] Because abstention is clearly foreclosed under *Gibson*, respondents' lengthy attempt to establish that the *Hess* action involves a vital state interest is irrelevant. See Br.in Opposition, pp. 17-19. In any event, however, petitioners note that there is no authority for the proposition that a proprietary contractual claim for oil royalty payments involves an important state *governmental* interest sufficient to justify *Younger* abstention.

Similarly, because petitioners do not challenge the state's processes for enforcing its judgments or any other state procedure, but rather the state's attempt to prosecute its royalty claim before a biased tribunal,

Respondents' purported reliance on *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1 (1987) (Br.in Opposition, p. 12) is also unavailing. *Pennzoil* did not hold that federal claims are not ripe for decision by a federal court whenever they could be decided in state court, as respondents contend. Instead, this Court simply held that the lower courts should have *abstained* where the state proceedings involved a vital state interest and where there was no claim that the entire state tribunal was biased. That decision, based on satisfaction of the specific requirements strictly limiting the circumstances in which federal courts may properly abstain from the exercise of their jurisdiction—requirements not met here (Petition, pp. 18-23)—has no relevance to the correctness of the court of appeals' *ripeness* decision in this case.

4. Respondents provide no persuasive response to the fact that the court of appeals' decision conflicts with the settled rule that exhaustion of state remedies is not required in actions under 42 U.S.C. § 1983. See *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982). Respondents refer to *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) (Br.in Opposition, p. 15, n. 8), but there this Court held simply that a developer could not challenge the application of a zoning ordinance as a taking until it sought and was denied a variance. Until that time, no taking could be said to have occurred. In this case, in contrast, respondents are presently being denied due process of law by the existing and continuing prosecution of the *Hess* action before a biased state tribunal, and no "variance" is possible because all Alaska judges and jurors are subject to the same disqualifying financial interest.

5. Finally, disregarding that neither of the courts below even reached the merits of the controversy, let alone disposed of them, respondents urge this Court to deny certiorari on the ground that petitioners' due process claim allegedly lacks merit. Br.in Opposition, pp. 21-25. Not only is this suggestion self-evidently incor-

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this case does not involve the interests found sufficient in *Pennzoil*, supra, and *Juidice v. Vail*, 430 U.S. 327 (1977).

rect,[8] but it is clear, in any event, that petitioners have stated a viable claim for relief.[9]

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[8] Respondents' motion to dismiss petitioners' complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim was denied by the district court, and respondents did not appeal that ruling.

[9] Respondents rely on a recent amendment to the Alaska statute governing the funds available for distribution as Permanent Fund dividends. Respondents concede, however, that this statute is limited to "money damages awarded to the State in *Amerada Hess*" and has no application to the bulk of the increased revenues petitioners allege the state will receive if it prevails in *Hess*, through increased future royalty payments and through additional payments under existing contracts containing an *Amerada Hess* adjustment clause. Br.in Opposition, pp. 23-24.

Respondents also claim that it is "significant" that these increased revenues will not flow "immediately" or "directly" to the state, and that dividend checks will not "immediately" increase upon the state's receipt of the money. Br.in Opposition, p. 24. There is no doctrine, however, that a judge or juror's financial interest in a case may be excused on the ground that the financial benefit may be slightly delayed, or that the benefit may not be as great at first as in later years. Similarly, there is no merit to respondents' argument that the financial interest in this case should be ignored because the continuation of the Permanent Fund dividend program cannot be "guaranteed." Id., p. 25. The entirely speculative possibility of some hypothetical future legislative action is not sufficient to defeat the presently existing financial interest in this case. Cf. *Albertson v. SACB*, 382 U.S. 70, 76-77 (1965).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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